Supreme Court, U.S.
FILED
JAN 9 - 2008
OFFICE OF THE CLERK

No. - 07-924

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

—v.—

NOVELL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 9, 2008

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Question Presented

Whether a plaintiff who is not a participant (*i.e.*, a consumer or a competitor) in the market in which competition was allegedly restrained can have suffered the antitrust injury that is a prerequisite for standing to sue under the federal antitrust laws.

List of Parties and Rule 29.6 Statement

The parties to the proceedings before the United States Court of Appeals for the Fourth Circuit were petitioner Microsoft Corporation and respondent Novell, Inc.

Microsoft Corporation has no corporate parents, and no publicly-held company owns 10% or more of the stock of Microsoft Corporation.

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MICROSOFT CORPORATION,

Petitioner,

v.

NOVELL, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation ("Microsoft") respectfully petitions for a writ of certiorari to review the October 15, 2007 judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The decision of the court of appeals (A1–43) is reported at 505 F.3d 302. The decision of the district court on Microsoft's motion to dismiss (A44–55) is reported at 2005-1 Trade Cases (CCH) ¶ 74,830. The decision of the district court granting Microsoft's

motion for interlocutory appeal to the court of appeals (A56–58) is reported at 2005-2 Trade Cases (CCH) ¶ 74,899.

Jurisdiction

The court of appeals entered its judgment on October 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 4 of the Clayton Act, 15 U.S.C. § 15, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, are set out in the appendix hereto at pages A59 to A63.

Statement of the Case

This case raises a question of fundamental importance to the administration of the federal antitrust laws. A circuit split exists as to whether a plaintiff who is not a participant in the market in which competition was allegedly restrained can have suffered the antitrust injury that is a prerequisite for standing to sue under Section 4 of the Clayton Act. The Fourth Circuit held, in conflict with six other courts of appeals, that respondent Novell, Inc. ("Novell") had antitrust standing to seek treble damages for harm allegedly inflicted on its word processing and spreadsheet applications that neither competed nor had the potential to compete in the personal computer ("PC") operating system market. By granting standing to a non-participant in the market such as Novell, the Fourth Circuit has expanded the scope of the federal antitrust laws far

beyond what Congress mandated or what this Court's jurisprudence instructs.

Novell is a software company that briefly owned WordPerfect, a word processing application, and Quattro Pro, a spreadsheet application. Novell purchased these "office productivity applications" in 1994 and sold them in 1996. Novell's claims in this action are based exclusively on alleged injury to these products.

Microsoft is a software company that develops and sells, among other things, the Windows PC operating systems. Novell alleges that, at all relevant times, Microsoft was dominant in the PC operating system market, although other PC operating systems existed in 1994–96 and continue to exist.

It is undisputed that office productivity applications and PC operating systems are distinct classes of software products that exist in separate markets. As Novell asserted in its Complaint, PC operating systems are the "platforms" on which applications such as WordPerfect and Quattro Pro are designed to run.

A. Proceedings in the District Court

Novell brought this action in November 2004, seeking treble damages against Microsoft under the federal antitrust laws.[1] The Complaint set forth six

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[1] This action was originally filed in the District of Utah and was later transferred by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, to the District of Maryland. The federal district courts had subject matter jurisdiction over Novell's claims under 28 U.S.C. §§ 1331 and 1337.

claims, two of which — Counts I and VI — are the subject of this petition.[2] Count I alleged monopolization of the PC operating system market, but asserted injury only to applications (WordPerfect and Quattro Pro) that competed in other markets. Count VI alleged exclusionary distribution agreements that violated 15 U.S.C. § 1 because they restrained competition in the PC operating system market, but again, Novell alleged injury only to its office productivity applications that competed outside the PC operating system market.

It is undisputed that Novell's claims arose before March 1996, when Novell sold its word processing and spreadsheet applications to Corel Corporation. As a result, each of Novell's claims is time-barred unless it was tolled by the filing of the action brought against Microsoft by the U.S. Department of Justice on May 18, 1998 (the "Government Action"),[3] which alleged harm to the PC operating system market and a purported market for internet browsers.[4]

---

[2] Counts II through V in Novell's Complaint alleged anticompetitive conduct in purported markets for word processing applications and spreadsheet applications.

[3] *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[4] The statute of limitations for federal antitrust claims is four years. 15 U.S.C. § 15b. Under 15 U.S.C. § 16(i), a private antitrust claim may be tolled if "based in whole or in part on any matter complained of" in a federal government antitrust enforcement action.

Microsoft moved to dismiss the Complaint. The district court held that Counts II through V were time-barred. It ruled that those claims could not benefit from the tolling provisions of the Clayton Act, 15 U.S.C. § 16(i), because, among other things, the purported markets for word processing applications and spreadsheet applications are "distinct" from the markets at issue in the Government Action. (A50–54.)

As to Counts I and VI, Microsoft contended that Novell lacked antitrust standing to assert those claims because Novell's office productivity applications were not actual or potential competitors in the PC operating system market. The district court recognized that Novell was seeking recovery "for damage not to . . . any . . . [PC] operating system but for damage to applications software," and acknowledged that "[c]ertainly, consumers and competitors in a given market are favored plaintiffs." (A51 (internal quotation marks omitted).) Nevertheless, the court held that Novell could proceed with Counts I and VI because those claims supposedly met other elements of "the multi-factored test" for antitrust standing established by *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983). (A48.)

Microsoft moved for an order certifying the district court's antitrust standing ruling for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted that motion, noting that there was "substantial ground for difference of opinion" about the correctness of its ruling. (A57.) The court of appeals subsequently granted Microsoft's petition

for review. Thereafter, the district court granted a motion by Novell for entry of final judgment as to Counts II through V, allowing Novell to cross-appeal the dismissal of those claims. The court of appeals consolidated the two appeals.

B. Opinion of the Court of Appeals

On October 15, 2007, the court of appeals affirmed the district court, finding that Novell had antitrust standing to pursue claims for injury to its word processing and spreadsheet applications based on allegations of anticompetitive conduct in the PC operating system market. The court of appeals also affirmed the dismissal as time-barred of Novell's claims of anticompetitive conduct in purported markets for word processing and spreadsheet applications.

The court of appeals acknowledged that "Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-system market." (A8.) It also recognized that Novell's office productivity applications were outside that market (A37), as Novell itself had conceded. (A10–11.) Nevertheless, the court of appeals held that Novell had suffered antitrust injury and thus had standing to sue under the federal antitrust laws. In doing so, the court of appeals rejected Microsoft's contention that only consumers or competitors (actual or potential) in the market where competition was allegedly restrained can suffer antitrust injury.

Reasons for Granting the Petition

The issue of antitrust standing is fundamental to the proper administration of the antitrust laws,

and has resulted in divergent decisions by the courts of appeals. Granting antitrust standing to parties other than consumers or competitors in the allegedly restrained market, as the Fourth Circuit has done, significantly expands the class of potential plaintiffs permitted to seek treble damages under the federal antitrust laws. If left undisturbed, the decision of the court of appeals will extend the federal antitrust laws far beyond their intended scope.

This Court has observed that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages." *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 477 (1982). Thus, a private plaintiff seeking treble damages under Section 4 of the Clayton Act must prove the existence of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). This Court has made it clear that antitrust injury is a prerequisite of antitrust standing under Section 4. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986).

Novell alleged anticompetitive conduct in the PC operating system market but injury only to products that competed in purported markets for office productivity applications. The court of appeals held that even though Novell was not a participant in the market in which competition was allegedly restrained, it had suffered the antitrust injury that is a prerequisite for antitrust standing. That holding conflicts with decisions in several circuits holding

that only consumers and competitors in the allegedly restrained market can suffer antitrust injury. Moreover, by granting antitrust standing to parties other than consumers or competitors, the court of appeals ignored "the central interest [of the antitrust laws] in protecting the economic freedom of *participants in the relevant market*." *AGC*, 459 U.S. at 538 (emphasis added).

The circuits are sharply split over whether an exception to the consumer-or-competitor rule exists for plaintiffs whose injuries are "inextricably intertwined" with the injury suffered by a direct victim of an antitrust violation. *See McCready*, 457 U.S. at 484. The decision of the court of appeals is in line with decisions of a few circuits that have carved out such an exception. A majority of circuits have held that this Court's precedents mandate exactly the opposite result.

The "inextricably intertwined" formulation is frequently relied on by plaintiffs to prevent dismissal of antitrust claims they have no standing to assert, resulting in substantial and unjustified costs to defendants and the federal court system. *Cf. Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting that "proceeding to antitrust discovery can be expensive" and "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). A bright-line rule that limits antitrust standing to consumers or competitors in the allegedly restrained market would help prevent "the antitrust laws [from] becom[ing] a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant

them to be." *NicSand, Inc.* v. *3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007).[5]

Delineating the type of injuries that give rise to a cause of action under the federal antitrust laws is a foundational issue that speaks to the very purpose of those laws. It has been more than 30 years since this Court articulated the rule in *Brunswick* requiring a plaintiff to have suffered antitrust injury in order to have standing to sue under Section 4 of the Clayton Act. The uncertainty that has arisen in recent years about the antitrust injury requirement, as evidenced by the circuit split regarding the meaning of the "inextricably intertwined" language in *McCready* (*see* pp. 14–15, *infra*), makes review by this Court all the more appropriate.

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[5] The court of appeals quoted out of context this Court's observation that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case." (A19 (quoting *AGC*, 459 U.S. at 536).) The *AGC* Court was discussing the multifaceted inquiry into antitrust *standing*, not the antitrust injury that is a prerequisite for such antitrust standing. Moreover, while it is true that alleged injuries must be analyzed on a case-by-case basis to determine whether they are "of the type that the antitrust statute was intended to forestall," *AGC* 459 U.S. at 540, nothing in this Court's jurisprudence suggests that the "bright-line" requirement that a plaintiff be a consumer or competitor in the allegedly restrained market should be erased in favor of an elastic line that can be stretched beyond recognition.

I. The Court of Appeals' Decision Conflicts with Decisions of Other Courts of Appeals and Is Contrary to this Court's Antitrust Standing Decisions

Because the antitrust laws are intended to protect "participants in the relevant market," *AGC*, 459 U.S. at 538, it follows that antitrust injury can only be suffered by participants in the allegedly restrained market. *See Brunswick*, 429 U.S. at 489. In explaining why plaintiff in *AGC* had not suffered antitrust injury, this Court stated that plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained." *AGC*, 459 U.S. at 539.

Accordingly, a number of circuits have held that only consumers or competitors in the relevant market[6] can suffer the antitrust injury that is a prerequisite for antitrust standing:

- *SAS of Puerto Rico, Inc.* v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 44 (1st Cir. 1995) — "[T]he presumptively 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who seeks to serve that market."[7]

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[6] Some courts of appeals have articulated the consumer-or-competitor rule as providing that only "market participants" can suffer antitrust injury.

[7] In *SAS*, Judge Boudin suggested that a party outside the allegedly restrained market might have antitrust standing in the rare case where no consumer or competitor in the market had "the incentive or ability to sue." 48 F.3d at 45. This potential exception, even if valid, is plainly not relevant here. Microsoft has faced more than 100 private antitrust suits

(footnote continued)

- *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 179 (3d Cir. 1997) (Alito, J.) — "[T]he injury alleged by [plaintiff] is not the type of injury that the antitrust laws were intended to prevent because [plaintiff] was not a competitor or a consumer in the market in which trade was allegedly restrained."

- *Norris* v. *Hearst Trust*, 500 F.3d 454, 466 (5th Cir. 2007) — "Plaintiffs are neither consumers . . . nor competitors . . . in the relevant market. Plaintiffs have not suffered antitrust injury."

- *Illinois ex rel. Ryan* v. *Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000) — "Antitrust standing is limited in several ways: the plaintiffs must not be too remote from the injury, and so normally only consumers or competitors have standing . . . ."

- *S.D. Collectibles, Inc.* v. *Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) — "[S]tanding is generally limited to actual market participants, that is, competitors or consumers."

- *Florida Seed Co.* v. *Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) — "Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market."

(footnote continued)
brought by consumers, competitors and potential competitors in the PC operating system market. It has paid billions of dollars in settlements to actual market participants.

Justice Alito endorsed the consumer-or-competitor rule during his tenure on the Third Circuit. In *Barton & Pittinos*, he wrote that where a plaintiff is "not a competitor or a consumer in the market in which trade was allegedly restrained," the "alleged injury is not 'antitrust injury,' meaning injury 'of the type that the antitrust statute was intended to forestall.'" 118 F.3d at 184 (quoting *AGC*, 459 U.S. at 540).[8] This is the bright-line rule advocated by Microsoft in the lower courts.

The decision of the court of appeals is squarely at odds with the decisions set forth above of six other circuits that have embraced the consumer-or-competitor rule.[9] The court of appeals recognized that Novell was not a consumer or competitor in the PC operating system market. (A36.) Novell could

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[8] In its decision below, the Fourth Circuit opined that the Third Circuit's decision in *Carpet Group Int'l, Inc.* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), had "explicitly moved away" from *Barton & Pittinos*'s holding. (A21); *see Carpet Group Int'l*, 227 F.3d at 76–77 (stating in dicta that there is an exception to the consumer-or-competitor rule where plaintiff's "harm is 'inextricably intertwined' with the defendant's wrongdoing"). Even assuming that to be so, the Third Circuit has recently returned to the rule articulated by Justice Alito, holding in 2007 that even under the "inextricably intertwined" formulation, "plaintiffs and defendants [must be] in the business of selling goods or services in the same relevant market." *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297, 320–21 (3d Cir. 2007).

[9] In fact, the Fourth Circuit itself adhered to the majority position before the abrupt about-face that gave rise to this petition. *See White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987); *Thompson Everett, Inc.* v. *Nat'l Cable Advcr., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995).

not have suffered injury in that market, and did not claim to have done so. Instead, Novell alleged that Microsoft engaged in anticompetitive conduct in the PC operating system market that caused injury to Novell's office productivity applications, which did not compete, and had no potential to compete, in that market. In ruling that Novell nonetheless had suffered antitrust injury, the court of appeals relied on a purported exception to the consumer-or-competitor rule for a plaintiff whose injury is "inextricably intertwined" with injury suffered by a direct victim of an antitrust violation. (A23–24.)[10]

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[10] The court of appeals also erroneously drew support for its rejection of the consumer-or-competitor rule from the Government Action. There, Microsoft was alleged to have engaged in anticompetitive conduct directed toward Netscape's Navigator web browsing software and Sun Microsystems' Java technology in order to protect its PC operating system monopoly. *Microsoft Corp.*, 253 F.3d at 53–55. The Fourth Circuit reasoned that although Sun and Netscape were neither consumers nor competitors in the PC operating system market, they "would have had standing to sue Microsoft privately under § 4." (A24–25.)

This overlooks the fact that, unlike Novell, both Netscape and Sun Microsystems were potential competitors of Microsoft in the PC operating system market, which is why Microsoft was found liable in the Government Action for its actions directed against those two products. *See Microsoft Corp.*, 253 F.3d at 79. As the Third Circuit recently explained, the products at issue in the Government Action were "nascent competitive threats" entitled to the protection of the Sherman Act. *Broadcom*, 501 F.3d at 320. The Third Circuit found that the Government Action was "inapposite" where — as here — "there is no allegation that [plaintiff] has sought, seeks, or ever will seek to enter the" relevant market. *Id.*

The decision of the court of appeals is in line with decisions by a minority of circuits that have found that *McCready* carves out such an exception. *E.g.*, *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079, 1086–87 (6th Cir. 1983); *American Ad Mgmt., Inc.* v. *Gen. Tel. Co. of California*, 190 F.3d 1051, 1057 n.5 (9th Cir. 1999); *Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir. 1990). The First Circuit has noted the existence of a circuit split on this issue. *Sullivan* v. *Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994); *see also Daniel* v. *American Bd. of Emergency Med.*, 428 F.3d 408, 451 (2d Cir. 2005) (Katzmann, J., concurring in part) ("courts do indeed dispute the circumstances under which a party that is neither a competitor nor a consumer may demonstrate antitrust injury").

Because the court of appeals here rejected the consumer-or-competitor rule so categorically, this case provides an ideal opportunity for this Court to resolve the circuit split and clarify the proper reach of the federal antitrust laws.

II. The Court of Appeals Misunderstood this Court's Decision in *McCready*

The Fourth Circuit and other courts of appeals that have construed the "inextricably intertwined" language in *McCready* to create an exception to the consumer-or-competitor rule have expanded antitrust standing beyond any reasonable limit. Such a broad reading of *McCready* is not supported by the facts of the case itself. As this Court noted in *AGC*, and as the Fourth Circuit acknowledged (A23), plaintiff in *McCready* *was* a consumer in the allegedly restrained market. *AGC*, 459 U.S. at 538.

McCready's observation that Section 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," 457 U.S. at 472, was clarified in *AGC* to be merely a "paraphras[e] of the language of § 4" that "added nothing to the even broader language that the statute itself contains." 459 U.S. at 529 n.19. As the Court in *AGC* made clear, the question of whether a party "may recover for the injury it allegedly suffered . . . cannot be answered simply by reference to the broad language of § 4." *Id.* at 535.

Other courts of appeals have properly concluded that *McCready*'s "inextricably intertwined" language was never intended as a legal test for antitrust standing. As Judge Boudin wrote in *SAS*, "[q]uite apart from difficulties in application, such a test would certainly be very hard to square with the longstanding limitations on claims by stockholders, employees and even indirect purchasers." 48 F.3d at 46. Judge Boudin also observed that this Court subsequently "reinterpreted the phrase as a legal conclusion" signifying that the plaintiff must be a consumer or competitor in the restrained market. *Id.* (citing *AGC*, 459 U.S. at 539; *Atlantic Richfield Co.* v. *USA Petroleum Co.* (*ARCO*), 495 U.S. 328, 345 (1990)). The Fifth Circuit also has adopted this interpretation of the "inextricably intertwined" language in *McCready*. *See Norris*, 500 F.3d at 467 & n.18.

Moreover, decisions of courts of appeals which hold that a plaintiff can rely on the "inextricably intertwined" formulation to establish antitrust standing without showing that the plaintiff was a participant in the allegedly restrained market are in

direct conflict with this Court's precedents. *See, e.g.*, *Southaven*, 715 F.2d at 1086–87 (antitrust injury can be established if plaintiff was used "as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets"); *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739, 745–46 (9th Cir. 1984) (antitrust injury can be established if injury to plaintiff was necessary to achievement of defendants' anticompetitive objective). The Court in *Brunswick* held that antitrust injury must "flow[] from that which makes defendants' acts unlawful." 429 U.S. at 489.

An analysis of whether an injury is "inextricably intertwined" does not dispense with the requirement that the injury arise from the anticompetitive effects of an antitrust violation. *See ARCO*, 495 U.S. at 345; *SAS*, 48 F.3d at 46; *see also* 2A Phillip E. Areeda et al., ANTITRUST LAW ¶ 339f (3d ed. 2007) (McCready's injury was antitrust injury because it "flowed from that which made the defendant's conduct illegal, which in this case was the disruption of competition between psychiatrists and psychologists"). Injuries that do not flow from harm to competition in the relevant market are precisely the sort of "tangential" injuries that the antitrust laws are not intended to cover. *See McCready*, 457 U.S. at 477. Accordingly, antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny." *ARCO*, 495 U.S. at 334.

The court of appeals failed to establish any such connection. It merely noted that Novell had alleged anticompetitive conduct by Microsoft in the PC operating system market and claimed that injury

to Novell's office productivity applications was causally related to that conduct. (A28--30.) For example, the court found that Microsoft's alleged efforts to foreclose distribution channels for Novell's word processing and spreadsheet applications "would have naturally tended to decrease" Novell's share of the purported markets for those applications. (A29.) Critically, however, the court of appeals did not examine whether Novell's claimed injury flowed from harm to competition in the PC operating system market.[11] Had it done so, it would have concluded that the claimed injury to Novell's office productivity applications did not flow from competitive conditions in the PC operating system market. Such attenuated injury is not within the intended scope of protection of the antitrust laws. Those circuits that have held otherwise — including the court of appeals here — have missed that essential point.

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[11] Insofar as Novell may have suffered injury from anticompetitive conduct by Microsoft in purported markets for office productivity applications, Novell asserted such claims in Counts II through V of the Complaint. The court of appeals properly held that those claims were time-barred. (A43.)

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 9, 2008

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOVELL, INCORPORATED *Plaintiff-Appellee,*	)	
v.	)	No. 06-1134
MICROSOFT CORPORATION *Defendant-Appellant.*	)	
NOVELL, INCORPORATED *Plaintiff-Appellant,*	)	
v.	)	No. 06-1238
MICROSOFT CORPORATION *Defendant-Appellee.*	)	

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(1:05-cv-01087-JFM; 1:00-md-01332-JFM)

Argued: December 1, 2006

Decided: October 15, 2007

Before WIDENER[1] SHEDD, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Shedd joined.

COUNSEL

ARGUED: Steven Lyon Holley, SULLIVAN & CROMWELL, New York, New York, for Appellant/Cross-Appellee. Charles Justin Cooper, COOPER & KIRK, P.L.L.C., Washington, D.C., for Appellee/Cross-Appellant. **ON BRIEF:** Thomas W. Burt, Steven J. Aeschbacher, MICROSOFT CORPORATION, Redmond, Washington; Robert A. Rosenfeld, HELLER, EHRMAN, WHITE & MCAULIFFE, L.L.P., San Francisco, California; David B. Tulchin, SULLIVAN & CROMWELL, New York, New York; G. Stewart Webb, VENABLE, L.L.P., Baltimore, Maryland, for Appellant/Cross-Appellee. R. Bruce Holcomb, Jeffrey M. Johnson, Milton A. Marquis, David L. Engelhardt, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, D.C.; David H. Thompson, Howard C. Nielson, David M. Lehn, COOPER & KIRK, P.L.L.C., Washington, D.C., for Appellee/Cross-Appellant.

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[1] Judge Widener heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

OPINION

DUNCAN, Circuit Judge:

We are asked here to review cross appeals from two interlocutory orders in an antitrust action by Novell, Inc. ("Novell") against Microsoft Corp. ("Microsoft"). Novell seeks treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, for injuries allegedly suffered as a result of Microsoft's anticompetitive conduct in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In its suit filed in the District of Utah and transferred by the Judicial Panel on Multidistrict Litigation to the District of Maryland, Novell made six specific claims for damages to software applications it owned between 1994 and 1996. Two of the six claims allege that Microsoft's conduct injured competition in the market for PC operating systems, a market in which Novell's products did not directly compete. The district court declined to dismiss these claims over Microsoft's objection that Novell, as neither a consumer nor a competitor in the relevant market, lacks antitrust standing to bring them. Microsoft appeals the denial of this motion to dismiss.

The remaining four claims allege harm to competition in the software-application market, in which Novell did compete. The district court dismissed these claims as untimely, and Novell appeals.

For the reasons that follow, we affirm both rulings.

I.

A.

Novell is a software company that owned WordPerfect, a word-processing application,[2] and Quattro Pro, a spreadsheet application,[3] from 1994 until 1996.[4] WordPerfect and Quattro Pro are "office-productivity applications," which Novell marketed together as an office-productivity package called "PerfectOffice." Microsoft is a software company that owns Windows, a personal-computer ("PC") operating system, as well as office-productivity applications of its own.[5] An operating system is software that controls the computer's resources, including memory, disk space, keyboards, and the central processing unit. An operating system also facilitates communication between the computer's resources and software applications, including word-processing and spreadsheet applications. *United States v. Microsoft Corp.* (*"Microsoft II"*), 253 F.3d 34, 53-55, 60, 74 (D.C. Cir. 2001) (en banc); *United States v. Microsoft Corp.* (*"Microsoft I"*), 84 F. Supp. 2d 9, 12 (D.D.C. 1999). Therefore, computer users need an operating system to serve as a "platform" for the

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[2] A word-processing application is software that enables an end-user to create, edit, and print text-based documents.

[3] A spreadsheet application is software that enables an end-user to organize and manipulate quantitative data.

[4] In March 1996, Novell sold its office-productivity applications to Corel Corporation.

[5] Microsoft's office-productivity suite is called "Microsoft Office" and includes Word, a word-processing application, and Excel, a spreadsheet application.

applications they wish to run.[6] *Microsoft II*, 253 F.3d at 53. At one time, PCs were used primarily for word-processing, and even today, office-productivity applications remain among the most widely used types of applications available for PCs.

Although Microsoft overwhelmingly dominates the PC operating-systems market,[7] other operating systems exist.[8] Because these operating systems work differently from each other, software developers must create separate versions of their applications for each operating system in order for the applications to function properly on it. Modifying an application written for one operating system so that it can run on another is time-consuming and costly. Because of this, a new or less popular operating system faces significant obstacles to gaining market share. As the D.C. Circuit has explained,

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[6] Operating systems serve as platforms for software applications by making available to software developers protocols that perform certain widely-used functions. *Microsoft II*, 253 F.3d at 53. These protocols are referred to as Application Programming Interfaces ("APIs"). *Id.* For example, Windows includes an API that allows users to draw a box on the computer screen. *Id.* Software developers wishing to include that function in their applications for the Windows operating system may utilize the Windows API. *Id.*

[7] In *Microsoft II*, Microsoft did not challenge the district court's finding that Windows controlled greater than 95% of the PC operating-systems market. 253 F.3d at 54.

[8] These other PC operating systems include (or at one time included) Linux, Unix, and IBM OS/2. *See Microsoft II*, 253 F.3d at 52. Additionally, Apple's Macintosh operating system, Mac OS, exists outside of the PC operating-systems market. *See id.*

> the "applications barrier to entry"—stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.
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> *Microsoft II*, 253 F.3d at 55 (internal citations omitted).

In *Microsoft II*, the United States government and the governments of several states challenged activities by Microsoft that allegedly harmed competition in the PC operating-system market.[9] The United States Department of Justice filed a complaint against Microsoft on May 18, 1998 (the "DOJ complaint"). The DOJ complaint is based on allegations of anticompetitive conduct in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by Microsoft in two product markets: the market for PC operating systems and the market for Internet

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[9] Since that time, Microsoft has faced a number of private antitrust suits for allegedly unlawfully monopolizing or otherwise harming competition in the PC operating-systems market. *See, e.g., Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006); *Deiter v. Microsoft Corp.*, 436 F.3d 461 (4th Cir. 2006); *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322 (4th Cir. 2004); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517 (4th Cir. 2003).

browsers. J.A. 343 (DOJ Compl. ¶ 53). In a per curiam opinion, the D.C. Circuit, sitting en banc, found that Microsoft was not liable for attempted monopolization of the market for Internet browsers because the government had failed to carry its burden in two ways: (1) it failed to define the relevant market and (2) it failed to demonstrate that such a market could be monopolized, i.e., "that a hypothetical monopolist in that market could enjoy market power" because substantial barriers to entry protect it. *Microsoft II*, 253 F.3d at 81. Nevertheless, the court affirmed liability with respect to the claim that Microsoft unlawfully maintained a monopoly in the PC operating-system market. *Id.* at 58-80.

The government litigation in *Microsoft II* forms the basis of Microsoft's statute-of-limitations challenge to two of Novell's claims, as discussed below.

B.

Novell pursues six claims on appeal. Four of these, styled Counts II, III, IV, and V, allege monopolization or attempted monopolization of the markets for office-productivity applications. Novell's products, Word Perfect and Quattro Pro, directly competed in such markets. The other two claims, Counts I and VI, are based on the same alleged conduct as Counts II through V and seek recovery for damage to the same Novell products, but are predicated on the theory that Microsoft's conduct injured competition in the market for PC operating

systems, a market in which Novell did not directly compete.[10]

All six of Novell's claims arose prior to March 1996, when Novell sold WordPerfect and Quattro Pro to Corel Corporation. The statute of limitations for federal antitrust claims is four years. *See* 15 U.S.C. § 15b. Therefore, all of Novell's claims asserted in its November 2004 complaint are time-barred unless the statute of limitations is tolled by the filing of the DOJ complaint in May 1998. *See* 15 U.S.C. § 16(i). Section 5(i) of the Clayton Act provides that government antitrust proceedings toll the statute of limitations for private antitrust actions "based in whole or in part on any matter complained of" by the government. *Id.*

Novell's Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-systems market, which was at issue in the DOJ complaint. Novell's four other Counts, however, allege Microsoft's monopolization or attempted

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[10] Novell does not market an operating system comparable to Microsoft Windows. Novell did at one time own an operating system known as Novell DOS, which it sold to Caldera, Inc. ("Caldera") in 1996. Before the district court, Microsoft argued that Novell sold its claims for monopolization and attempted monopolization of the PC operating-system market to Caldera along with its PC operating-system business. Therefore, Microsoft asserted that in addition to lacking antitrust standing as to Counts I and VI, Novell no longer owned the claims therein.

The district court rejected Microsoft's argument. However, as noted above, we granted Microsoft's petition for interlocutory appeal on the antitrust-standing issue only, and thus the question of ownership of the claims is not before us.

monopolization of the markets for office-productivity applications, which conduct was not specifically alleged in the DOJ complaint.

Microsoft moved to dismiss all six Counts in the complaint. Because Counts II through V allege injury that is not specifically alleged in the DOJ complaint, Microsoft argued these claims were not tolled by the DOJ complaint and thus were time-barred. Microsoft sought dismissal of Novell's claims of injury to competition in the PC operating-systems market (the same market at issue in the DOJ complaint) in Counts I and VI on different grounds. Microsoft contended that Novell did not have antitrust standing to raise such claims and also that Novell did not own these claims.

The district court agreed with Microsoft regarding Counts II through V and dismissed those claims as untimely. However, the district court rejected Microsoft's arguments regarding antitrust standing and ownership of the claims and declined to dismiss Counts I and VI.

The district court certified its antitrust-standing and ownership rulings on Counts I and VI pursuant to 28 U.S.C. § 1292(b),[11] and Microsoft petitioned this

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[11] 28 U.S.C. § 1292(b) provides, in pertinent part:
When a district judge, in making in a civil action an order not otherwise appealable . . . , shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals which would have jurisdiction of an

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court for leave to appeal. We granted the petition with respect to the antitrust-standing issue only. Thereafter, Novell cross-appealed the dismissal of Counts II through V. We address, in turn, the issues of whether Novell has antitrust standing to bring Counts I and VI and the timeliness of Novell's claims in Counts II through V.

II.

We review de novo the district court's rulings on a motion to dismiss under Rule 12(b)(6). *See Holly v. Scott*, 434 F.3d 287, 288-89 (4th Cir. 2006). In assessing rulings on dismissals under Rule 12(b)(6), we accept the allegations of the plaintiff's complaint as true. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 143-44 (4th Cir. 1990).

We first review the district court's ruling that Novell has antitrust standing to bring Counts I and VI.

A.

Novell concedes that its products did not directly compete in the market for PC operating systems. Nevertheless, Novell contends that the technological connection between operating systems and applications gives rise to a significant barrier to entry into the operating-systems market and thus protects Microsoft's Windows monopoly. Novell maintains that its office-productivity applications

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appeal of such action may thereupon, in its discretion, permit an appeal to be taken of such order . . . .

could perform well on a variety of operating systems and that, during the relevant time period, they were the dominant office-productivity applications in the market.[12] The thrust of Novell's argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft's Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly.[13] That is, Novell argues its products could provide a path onto the operating-system playing field for an actual competitor of Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows.

Novell relies on certain unique characteristics of technological markets in making this argument. Courts have recognized that such markets are "characterized by network effects," and thus behave somewhat differently from more traditional markets. *Microsoft II*, 253 F.3d at 49. Because "'the utility that a user derives from consumption of the good

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[12] Novell claims that in 1990, WordPerfect controlled 47% of the word-processing market but that Microsoft's "assault" on its office-productivity applications resulted in a precipitous decline in WordPerfect's market share: to 40% in 1993, 30% in 1994, and less than 10% in 1996. Appellee's Br. at 15-16. At the same time, Microsoft Word's market share skyrocketed from 20% to 90%. *Id.* at 16.

[13] According to Novell, monopolizing the office-productivity-applications market was "an end in itself for Microsoft" (and the subject of Counts II through V of Novell's complaint), but "the primary purpose of Microsoft's anticompetitive scheme" was to protect Microsoft's PC operating-system monopoly, its "real cash cow." Appellee's Br. at 8.

increases with the number of other agents consuming the good,'" one product "'tends towards dominance.'" *Id.* (quoting Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)). In this way, then, competition "is 'for the field' rather than 'within the field.'" *Id.* (quoting Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & Econ. 55, 57 & n.7 (1968) (emphasis omitted)). Put another way, firms compete to dominate the market, and once dominance is achieved, threats come largely from outside the dominated market, because the degree of dominance of such a market tends to become so extreme. Indeed, in *Microsoft II*, Microsoft did not dispute the finding that Windows controlled more than 95% of the operating-system market. *Id.* at 54.

Building on this same theory, the government in *Microsoft II* argued that Microsoft preserved its advantage in the PC operating-system market by targeting certain "middleware" products, specifically Sun's Java programming environment and Netscape's Navigator web browser.[14] 253 F.3d at 53-

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[14] "Middleware" is a term used to refer to software products that have the capability to serve as platforms for software applications themselves. *Microsoft II*, 253 F.3d at 53. They expose, or make available, their own APIs, *see supra* note 6, and theoretically, software developers could rely upon these APIs rather than Windows's APIs for basic routines. *Id.* Because Java and Navigator were written for multiple operating systems, software developers could potentially use them as platforms for their applications rather than rewriting them for each operating system. *Id.* However, no middleware product could expose nearly enough APIs to serve as a platform for popular applications or to usurp operating-system functions. *Id.* Nor, the district court found and the D.C. Circuit affirmed,

(footnote continued)

54, 60. Java and Navigator were defined by the D.C. District Court as *outside* of the PC operating-system market, a finding affirmed by the D.C. Circuit. *See id.* at 53-54. Notwithstanding the fact that the primary threats at issue in the government action stood outside of the PC operating-system market, Microsoft was found to have unlawfully monopolized that market. *Id.* at 64, 71, 74, 76, 77.

Novell's present claims echo the government's theory in *Microsoft II*. Just as the middleware threat posed by Java and Navigator came from outside the Microsoft dominated PC operating-system market, Novell now argues that its products, though also outside the relevant market, similarly threatened Microsoft Windows.

Novell alleges three specific unlawful actions on the part of Microsoft that harmed its products and also harmed competition in the PC operating-systems market. First, Novell claims Microsoft withheld from Novell key technical information necessary to make well-functioning office-productivity applications for Windows 95, an updated version of Windows launched by Microsoft during the period that Novell owned WordPerfect and Quattro Pro. Because PC users would, upon the launch of Windows 95, upgrade their applications en

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would any middleware product do so in the foreseeable future. *Id.* Notably, Microsoft did not challenge these findings, apparently conceding that Java and Navigator were not present competitors of its Windows operating system. *Id.* Microsoft does not argue to this court that Java and Navigator are now its competitors either.

masse, Novell's office-productivity applications would lose critical market share if Novell did not have viable Windows 95 versions ready at the time of the launch. Because of the network effects that favor already popular applications, Novell's applications' loss of market share could in turn lead to a decrease in demand for the competing operating systems that support these applications. Thus, WordPerfect and Quattro Pro's loss of market share would reduce the potential for Novell's products to enable an alternative operating system to surmount the applications barrier to entry and compete with Windows.

Second, Novell argues that Microsoft impeded Novell's access to distribution channels, including original equipment manufacturers ("OEMs"). OEMs manufacture PCs and typically preinstall an operating system and certain commonly used applications. Because Windows's monopoly in the operating-system market means most consumers want to buy Windows-equipped PCs, OEMs desire Windows licenses that enable them to install Windows on PCs. Novell asserts that OEMs' dependence on Windows licenses furnished Microsoft with leverage that it used to impose restrictive and exclusionary agreements on OEMs. These agreements rewarded, or required as a condition of obtaining a Windows license, the preinstallation of Microsoft's office-productivity suite, and prohibited or punished the installation of competing applications. As with Microsoft's alleged conduct regarding Windows 95 described above, this action would have the effect of decreasing Novell's once-dominant market share and its products' popularity,

hampering Novell's ability to make an alternative operating system attractive to PC users.

Finally, because Windows is the dominant operating system serving as a platform for software applications, software makers seek to have their products certified as Windows-compatible. Such certification is a signal to software consumers that a product is compatible with the most popular operating system. Novell claims that Microsoft required it, as a condition of being certified as Windows-compatible, to use Windows-specific technologies that degraded the performance of Novell's office-productivity applications on other operating systems. This requirement neutralized Novell's applications' purported advantage of working well on a variety of operating systems. Novell claims that such an advantage, along with Novell's applications' popularity, could have enabled other operating systems to bridge the "moat" that protected Microsoft's Windows monopoly.[15]

B.

We now turn to the legal underpinnings of antitrust standing. In a private antitrust action, a plaintiff must go beyond a showing that it meets the Article III standing requirements of injury, causation, and redressability; it must also

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[15] Microsoft official Jeff Raikes described this "moat" in an email to investor Warren Buffett:

> If we own the key 'franchises' built on top of the operating systems, we dramatically widen the 'moat' that protects the operating system business . . . .

J.A. 91.

demonstrate "antitrust standing." Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Although a literal reading of § 4 is "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation," the Supreme Court has interpreted the provision more restrictively. *See Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters* (*"AGC"*), 459 U.S. 519, 529-30 (1983). "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972). "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *AGC*, 459 U.S. at 534 (internal quotation omitted).

A plaintiff sufficiently connected to the violation propagating these "ripples of harm" is said to have "antitrust standing."[16] *Id.* at 535 n.31. The Supreme

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[16] The concept of antitrust standing is narrower than constitutional standing. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact," but courts must make an independent determination of whether "the plaintiff is a proper party to

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Court has held that a multi-factor analysis is required to determine whether a private plaintiff has antitrust standing. *See id.* at 536-38. These factors "circumscribe and guide" courts' judgments on whether plaintiffs have antitrust standing. *Id.* at 537. The Courts of Appeals have since relied on the *AGC* factors to determine antitrust standing. *See Bodie-Rickett & Assocs. v. Mars, Inc.*, 957 F.2d 287, 291 (6th Cir. 1992); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 962-63 (10th Cir. 1990); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 294-95 (2d Cir. 1983). This court recently had the occasion to apply the *AGC* factors, distilling them to five:

> (1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; (2) whether the harm was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws; (3) the directness of the alleged injury; (4) the existence of more direct victims of the alleged antitrust injury; and (5) problems of identifying damages and apportioning them among those directly and indirectly harmed.

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bring a private antitrust action." *AGC*, 459 U.S. at 535 n.31 (citing Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 813 n.11 (1977)). This inquiry requires us to focus on the multiple factors identified by the Supreme Court in *AGC*. *Id.* at 537-44.

Kloth v. Microsoft, 444 F.3d 312, 324 (4th Cir. 2006) (internal quotations and citations omitted).[17]

The first two of these antitrust-standing factors together encompass the concept of "antitrust injury." *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury has been defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." *Brunswick*, 429 U.S. at 489.[18] The other three *AGC* factors focus on the directness or remoteness of the plaintiff's alleged antitrust injury.

Before applying the *AGC* factors to the facts of this case, however, we must first consider Microsoft's

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[17] The plaintiffs in *Kloth* were indirect purchasers of Microsoft's operating system; that is, they did not buy the software directly from Microsoft. Therefore, we held that they were barred from seeking recovery for illegal pass-through overcharges under the principles of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Kloth*, 444 F.3d at 317. The holding in *Illinois Brick*, that only direct purchasers of products affected by the antitrust violations can sue for treble damages under § 4 of the Clayton Act, *see* 431 U.S. at 729-30, is generally inapplicable to the instant appeal. In *Kloth*, however, we also applied the *AGC* factors and found that the plaintiffs lacked standing to seek recovery for injuries other than overcharges. 444 F.3d at 324-25.

[18] In *Brunswick*, the plaintiff, a retail bowling center, sued the defendant, who acquired several rival retail bowling centers that otherwise would have closed. 429 U.S. at 488. The plaintiff was denied antitrust standing because losing profits as a result of *enhanced* competition is not the type of injury the antitrust laws were designed to prevent. *Id.* Awarding damages for that type of injury, the Supreme Court noted, "is inimical to purposes of these laws." *Id.*

argument that Novell's claims fail as a threshold matter. Microsoft asks us to adopt a bright-line rule that only consumers or competitors in the relevant market have antitrust standing to bring private treble-damages claims under § 4. Were we to adopt this proffered rule, Microsoft argues, we would be compelled to find, before reaching the five-factor analysis, that Novell does not have standing in this case because its products did not directly compete in the operating-system market.

We must decline to adopt Microsoft's "consumer-or-competitor" rule. We note that the Supreme Court has rejected the utility of the very type of bright-line approach on which Microsoft seeks to rely: "The infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *AGC*, 459 U.S. at 536. In fact, a careful examination of the cases on which Microsoft relies for support of its proposed rule reveals that in most instances the claims were defeated by the absence of an antitrust injury, rather than the plaintiff's failure to demonstrate consumer or competitor status.[19]

For example, in *AGC*, the plaintiff-union claimed that the defendant-contractors' association and its members violated the antitrust laws by coercing

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[19] It may be more likely that a consumer or competitor in the relevant market will suffer an antitrust injury than a plaintiff who is neither a competitor nor a consumer. This does not necessarily preclude, however, a party who is neither from having an antitrust injury. Thus, like the Supreme Court in *AGC*, we do not stop our analysis merely because Novell is neither a competitor nor a consumer.

third parties and some of the association's members into doing business with nonunion firms. *Id.* at 520-21. In denying standing to the union, the Supreme Court noted that the plaintiff was "neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539. But the Court went on to discuss other factors, and ultimately concluded that the plaintiff-union's injury did not flow from a breakdown in competition. Indeed, it was "not clear whether the Union's interests would be served or disserved by enhanced competition in the market" for contractors' services. *Id.* The Court cited *Brunswick* for the proposition that unions will be unlikely to have antitrust standing, "especially in disputes with employers with whom [they] bargain[ ]," because in those instances the unions' injuries will most likely not be "of the type the antitrust statute was intended to forestall." *Id.* at 540.

Significantly, had the Supreme Court in *AGC* intended that consumer-or-competitor status be a necessary prerequisite for antitrust standing, it need not, after noting that the plaintiff was neither, have then discussed the other relevant factors and instructed lower courts to do the same. *Id.* at 537-38 & n.32 ("[C]ourts should analyze each situation in light of [these] factors."). That a plaintiff's status as a consumer or a competitor in the restrained market is *relevant* to the issue of antitrust standing is clear; the cases upon which Microsoft relies do not compel the conclusion that it is *necessary*.

Microsoft nevertheless insists that our own precedents rely on its proposed consumer-or-

competitor rule.[20] *See Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101 (4th Cir. 1987). Careful consideration of those cases, however, reveals that they do not provide direct support for the position Microsoft advances. Indeed, the cases are not antitrust-standing decisions on the merits at all but rather arise in the context of plaintiffs' appeals from grants of summary judgment in favor of defendants. Because of the relevant differences in procedural posture between these two cases and the case at bar, neither *Thompson Everett* nor *White* is supportive of Microsoft's position at this stage of the litigation.

Microsoft correctly notes that we found the plaintiff in *Thompson Everett* to be neither a

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[20] Microsoft further relies on cases from the Third and Ninth Circuits which appear to adopt a consumer-or-competitor rule. *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997); *Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986). However, the courts in both circuits later explicitly moved away from those narrowing decisions. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 76-77 & n.12 (3d Cir. 2000) (noting that *Barton & Pittinos*' holding "rest[ed] on an overstated premise," that, "if construed as an absolute . . ., may in some circumstances lead to results that conflict with Supreme Court and other precedent"); *Amer. Ad Mgmt., Inc. v. Gen. Telephone Co. of Calif.*, 190 F.3d 1051, 1058 (9th Cir. 1999) (declaring that limiting antitrust standing to consumers and competitors would contravene Supreme Court precedent). For further discussion of the possible myopia of limiting antitrust standing to consumers or competitors in the relevant market, see Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 760-65 (2003).

consumer nor a competitor.[21] 57 F.3d at 1325. The decision to affirm summary judgment in favor of the defendants, however, was not based on this finding alone. Rather, we focused in *Thompson Everett* on the patent lack of any antitrust injury proven by the plaintiff at the summary-judgment stage. *Id.* ("[Plaintiff] is not being denied access to the cable company sales service market by any act in violation of the antitrust laws."). The plaintiff in *Thompson Everett* was a firm that sought to place advertising on cable television and other media for clients. *Id.* at 1321. Defendants were traditional cable representatives, retained by cable-television companies to sell cable-company air time. *Id.* Thompson Everett complained that the traditional cable representatives engaged in a horizontal conspiracy with one another and a vertical conspiracy with the cable companies to use their exclusive contracts to exclude independent cable-representative firms, like the plaintiff, from competition. *Id.* at 1321-22. However, at summary judgment, the district court found no evidence to support the plaintiff's claim of a horizontal conspiracy or that the short-term exclusive agreements between the cable companies and traditional cable representatives had an anticompetitive effect. *Id.* at 1322. Thus, Thompson Everett could not recover under the antitrust laws because it failed to show it had suffered antitrust injury, not because it was neither a consumer nor a competitor.

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[21] Unlike Novell, the plaintiff in *Thompson Everett* maintained that it was a competitor of the defendant. However, this court rejected that characterization. *Thompson Everett*, 57 F.3d at 1325.

Similarly, *White* involved a plaintiff-doctor's appeal from the district court's grant of summary judgment in favor of a defendant-hospital. The plaintiff alleged that the hospital had violated antitrust laws in designating a certain radiology practice as its preferred interpreter of CT scans. *White*, 820 F.2d at 100-01. As in *Thompson Everett*, we noted that the plaintiff was "neither a provider nor consumer" of hospital services. *Id.* at 104. But we affirmed summary judgment for other reasons, among them that the defendant-hospital was not a competitor in the market for interpreting CT scans and therefore could not be held liable as a monopolist in that market. *Id.* at 104-05. Additionally, we found a lack of antitrust injury because there was no evidence of a conspiracy between the hospital and the preferred radiology practice. *Id.* at 103.

We find additional support for our understanding that the *AGC* factors are not confined by a consumer-or-competitor rule in a Supreme Court case decided one Term earlier. *See Blue Shield v. McCready*, 457 U.S. 465, 479-84 (1982). In *McCready*, the plaintiff challenged her group health plan's refusal to reimburse subscribers for psychologists' services while reimbursing comparable treatment by psychiatrists. The Supreme Court affirmed that the plaintiff did have standing under § 4 of the Clayton Act. *Id.* at 484-85. Although the plaintiff was a "consumer" in the relevant market, the Supreme Court focused not on this status, but rather on the directness of the plaintiff's injury and the fact that her loss was of the type the antitrust laws were intended to prevent. *Id.* at 478. The Supreme Court stated: "Denying reimbursement to subscribers for

the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends." *Id.* at 479. Additionally, the plaintiff's injury—bearing the unreimbursed cost of her psychologist's services—was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 483-84.

Notably, the Court in a footnote specifically contemplates a party other than a consumer or competitor having antitrust standing: "If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions." *Id.* at 481 n.21. Even if this footnote is read as dicta, it provides further evidence that the Supreme Court does not limit the universe of proper plaintiffs under § 4 as narrowly as would Microsoft. The Court's decision not to adopt a bright-line rule the next year in *AGC* bolsters this conclusion. *See* 459 U.S. at 536.

Finally, the government's May 1998 antitrust suit against Microsoft detailed Microsoft's anticompetitive activities in the operating-system market that harmed "middleware" products, Sun's Java programming environment and Netscape's Navigator web browser, defined by the D.C. Circuit as *outside* of the operating-system market. *Microsoft II*, 253 F.3d at 52-54. Although standing was not at issue, an implication of the government action is that Sun or Netscape—neither consumers nor competitors in the PC operating-systems market—would have had

standing to sue Microsoft privately under § 4, and Microsoft concedes as much.[22]

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[22] Microsoft does not deny that Sun and Netscape would have had standing for a private suit. Instead, Microsoft focuses on the fact that middleware products such as Java and Navigator had the technological potential to compete with operating systems in the future. *See Microsoft II*, 253 F.3d at 53-55. The hypothetical future capabilities of Java and Navigator do not meaningfully distinguish such products from Novell's applications, however. Indeed, Java and Navigator, like WordPerfect and Quattro Pro here, exist outside the market unlawfully monopolized by Microsoft. As with Novell's office-productivity applications, the primary threat that Java and Navigator posed to Windows was not that they were competitors or potential competitors in the operating-system market (indeed, the court found that they were not competitors or potential competitors within the relevant time frame) but rather that, from outside that market, they could enable an alternative operating system to compete with Windows. *Id.* at 55, 60, 74-80.

The anticompetitive activities that harmed Java and Navigator are undeniably similar to those alleged by Novell. For example, the D.C. Circuit found that provisions in Windows licenses issued to OEMs restricting them from distributing browsers other than Microsoft's own served to reduce Netscape's browser's market share:

> Therefore, Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development.

Id. at 60. Additionally, the D.C. Circuit cited internal Microsoft memoranda indicating an objective "to thwart Java's threat to Microsoft's monopoly in the market for operating systems," in which Microsoft espoused an intent to deceive Java developers into writing applications that only performed properly on Windows. *Id.* at 76-77 (citing a Microsoft document that stated,

(footnote continued)

C.

Having rejected Microsoft's argument that a bright-line consumer-or-competitor rule strips Novell of antitrust standing, we now consider whether the five *AGC* factors, as formulated in our decision in *Kloth*, compel dismissal of Novell's claims on antitrust-standing grounds. The first two factors—"(1) the causal connection between an antitrust violation and harm to the plaintiffs, and whether that harm was intended; and (2) whether the harm was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws"—are closely related. *See Kloth*, 444 F.3d at 324 (citations and internal quotations omitted). They ensure that the plaintiff claims the proper *type* of injury to be accorded antitrust standing. *See AGC*, 459 U.S. at 540 ("[E]ach [plaintiff's] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall."). The other factors, which involve examination of the directness or remoteness of the plaintiff's injury and the ease or difficulty of apportioning damages, may further constrict the number of private plaintiffs eligible to

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(footnote continued)

"Cross-platform [i.e., multiple operating system] capability is by far the number one reason for choosing/using Java").

As noted above, we are not sufficiently persuaded by Microsoft's proffered distinction between Novell's products and middleware to consider irrelevant the parallels between Novell's claims and the government's claims.

bring a treble-damages action under the federal antitrust laws.[23]

1.

We begin by reviewing the first two *AGC* factors. For ease of analysis, we reverse their order and examine first whether Novell has alleged an injury that the antitrust laws were intended to prevent, and then the causal connection between Microsoft's conduct and Novell's injuries. It is helpful in this regard to briefly revisit the purposes of antitrust laws.

"Antitrust laws . . . are the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). As the Supreme Court clarified in *Brunswick*, they "were enacted for the protection of *competition* not *competitors*." 429 U.S. at 488 (internal quotation omitted). Thus, the Sherman Act does not protect competitors from being destroyed through competition; on the contrary, such destruction can signal healthy functioning of the free-enterprise system. *See id.* The Sherman Act was enacted to protect the freedom to compete by curtailing the destruction of competition through

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[23] The Supreme Court has likened the common-law tort concept of proximate cause to the directness inquiry required by the additional *AGC* factors, emphasizing that both are somewhat elusive. *See McCready*, 457 U.S. at 477, 478 n.13 ("The traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law . . . . And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool.") (internal citations omitted).

anticompetitive practices. For example, a firm violates § 2 of the Sherman Act "when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident.'" *Microsoft II*, 253 F.3d at 58 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

Taking Novell's allegations as true, as we must, the injury that Novell alleges here is plainly an injury to *competition* that the antitrust laws were intended to forestall. Microsoft's activities, Novell claims, were intended to and did restrain competition in the PC operating-system market by keeping the barriers to entry into that market high.[24] Thus, we conclude that Novell has alleged harm of the type the antitrust laws were intended to prevent.

We now turn to the second facet of antitrust injury: the causal connection between Novell's injuries and Microsoft's alleged antitrust violations. Novell claims that its market share in the office-productivity-applications market was eroded as a result of Microsoft's activity, which was designed to and effectively did elevate the barriers to entry into the PC operating-systems market. As chronicled earlier in this opinion, Novell complains that Microsoft withheld key technical information from its

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[24] Of course, in the absence of Microsoft's alleged violations (i.e., in an unrestrained market), Novell's products still may have suffered from the competition from Microsoft's applications, but damage *from* competition is not what the antitrust laws protect. *See Brunswick*, 429 U.S. at 488.

software designers, disadvantaging Novell in preparing for the launch of the Windows 95 operating system; that Microsoft exploited its monopoly power to require or encourage OEMs to refrain from installing Novell's products on their computers, cutting off Novell's distribution channels; and that Microsoft required Novell to use Windows-specific technologies in order to be certified as Windows-compatible, degrading Novell's products' performance on other operating systems and harming their advantageous compatibility. All of these activities allegedly had the effect of thwarting the ability of Novell's products to lower the applications barrier to entry into the operating-system market, therefore harming competition in that market.

The analysis of the causal link between these activities and the decline in Novell's office-productivity-applications market share is straightforward. Microsoft's use of its monopoly power in the operating-system market to foreclose the distribution channels for Novell's applications, for example, would have naturally tended to decrease Novell's market share and consequently decrease the value of its applications. Likewise, withholding crucial data on its soon-to-be-released Windows 95 operating system would have put Novell at a competitive disadvantage vis-a-vis Microsoft's office-productivity applications, leading naturally to a loss of market share for Novell. This loss of market share could make a competing operating system featuring Novell's office-productivity applications less attractive to consumers, harming that competing

operating system's potential to surmount the barrier protecting the Windows monopoly.

In examining causation, we also consider "whether [the] harm was intended." *Kloth*, 444 F.3d at 324; *see also AGC*, 459 U.S. at 537 n.35. While mindful that the defendant's specific intent to injure the plaintiff is "not a panacea that will enable any complaint to withstand a motion to dismiss," we recognize that "there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under § 4." *AGC*, 459 U.S. at 537 & n.35. Here, Novell alleges that Microsoft specifically targeted its products for destruction as a means to damage competition in the operating-systems market. Novell's allegations go beyond mere speculation. They are supported by internal Microsoft communications. For example, Microsoft Chairman Bill Gates specifically suggested waiting to publish critical technical specifications of Windows 95 until "we have a way to do a high level of integration [between Microsoft Office and Windows 95] that will be harder for [the] likes of . . . WordPerfect to achieve." J.A. 95. Otherwise, Gates noted, "[w]e can't compete with . . . WordPerfect/Novell." *Id.* Additionally, Novell proffers the following email from senior Microsoft official Jeff Raikes to investor Warren Buffett:

> If we own the key 'franchises' built on top of the operating systems, we dramatically widen the 'moat' that protects the operating system business . . . . We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC.

J.A. 91. The "moat" protecting Windows to which Raikes refers is the applications barrier to entry; the email therefore supports Novell's assertions that its products were directly targeted.

In sum, the first two *AGC* factors weigh in favor of granting Novell antitrust standing. The facts alleged by Novell, taken as true for the purposes of this appeal, are sufficient to demonstrate that Novell suffered an antitrust injury and that its injury can be traced to Microsoft's alleged antitrust violations. While the showing of an antitrust injury demonstrates that a case is of the type for which antitrust standing is recognized, such a showing is not necessarily sufficient to demonstrate that the particular plaintiff has antitrust standing. Thus, we now turn to an analysis of the remaining *AGC* factors.

2.

The latter three *AGC* factors require us to consider "the directness of the alleged injury; . . . the existence of more direct victims of the alleged antitrust injury; and . . . problems of identifying damages and apportioning them among those directly and indirectly harmed." *Kloth*, 444 F.3d at 324 (internal quotations omitted). These additional factors are intended to further restrict entry into the federal courts for private enforcement of the antitrust laws. "[I]f afforded to every person tangentially affected by an antitrust violation or for all injuries that might conceivably be traced to an antitrust violation," the treble-damages remedy would open the door to much mischief, including the filing of claims that are remote from the forbidden

anticompetitive activity and the risk of duplicative lawsuits. *Cargill*, 479 U.S. at 111 n.6 (internal quotations omitted). That said, the Supreme Court has recognized that "in enacting § 4[,] Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *See McCready*, 457 U.S. at 472. The broad language of the statute, "and the avowed breadth of the congressional purpose, caution[ ] us not to cabin § 4 in ways that will defeat its broad remedial objective." *Id.* at 477.

Considerations of the directness of the plaintiff's injury and of the existence of more-directly harmed parties are closely related. Antitrust law favors granting standing to the most direct victims of defendants' anticompetitive conduct and denying standing to more remote victims on the theory that the direct victims have the greatest motivation to act as "private attorney[s] general" and "to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 542. Further, compensating only direct victims avoids duplicative recoveries. *Id.* at 543-44. Therefore, the existence of an identifiable, more-directly harmed class of victims with the incentive to sue under the antitrust laws weighs against granting standing to a more remote plaintiff. If, however, there is no more-directly harmed party with motivation to act as a private attorney general than the plaintiff, the "risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other" is mitigated. *AGC*, 459 U.S. at 543-44; *cf. Ill. Brick Co. v. Ill.*, 431 U.S. 720, 735

(1977) (limiting standing to recover money damages in price-fixing claim to direct purchasers in order to avoid duplicative recoveries and difficult damage-allocation problems).

For example, in *AGC*, the plaintiff-union sued a contractors' association, alleging that the defendants coerced members of the association and certain nonmembers to hire nonunion contractors and subcontractors. 459 U.S. at 540-41. The Court found that the union's injuries were derivative of any harm that may have been suffered by certain of its members. *Id.* at 541. By contrast, in *McCready*, there was no more direct victim of the defendants' anticompetitive acts than the plaintiff-consumer; she had paid for the services of a mental healthcare provider that itself could not complain of Blue Cross's refusal to reimburse McCready.[25] 457 U.S. at 475.

Here, Novell alleges that its software applications' popularity, quality, and ability to function well on multiple operating systems posed a potential threat to Microsoft's Windows monopoly by offering competing PC operating systems a bridge across the applications barrier to entry (i.e., the "moat" that protects Windows's monopoly) into that market. Novell claims that because of this threat, Microsoft directly targeted its products. As noted above,

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[25] The psychologists harmed by the anticompetitive activity at issue in *McCready* had, in fact, already maintained a successful suit against the insurer. 457 U.S. at 470 n.4. However, their injury (lost profits in selling their services) was distinct from that of McCready (reduced coverage on her health insurance policy).

Microsoft's specific intent with respect to Novell is not the decisive factor, but it is evidence that Microsoft viewed Novell as a threat that could enable competitors to gain a foothold in the operating-systems market. Furthermore, Microsoft's withholding of information from Novell's software developers relating to Windows 95 clearly has no more direct victim than Novell. Finally, Microsoft's exclusive deals with OEMs that ensured that Novell's products would not be preinstalled on new PCs built by those OEMs directly curtailed Novell's distribution channels.

Although Microsoft argues that a long list of better-situated plaintiffs than Novell exists, it mentions none by name or by category. Nevertheless, we surmise that such plaintiffs might include potentially competing operating systems, the OEMs who were restrained from installing Novell's products on computers they manufactured, or even consumers who purchased computers installed with Microsoft products at an inflated price because of a lack of competition. Without addressing whether plaintiffs representing each of these groups would have antitrust standing, we note that none of these parties has sued Microsoft on the theory that Microsoft's alleged destruction of Novell's dominant office-productivity applications harmed competition in the PC operating-system market. It may be that OEMs, for example, are too dependent on relationships with Microsoft for their business livelihood to have the incentive to pursue claims under § 4. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 879 (1977) (noting some parties "affected by an

antitrust violation may well not sue because of their stake in an ongoing commercial relationship with the violator."). This suggests that Novell may be the best-situated plaintiff to assert these claims. Indeed, today Novell may be one of the few private plaintiffs whose claims in this regard are neither time-barred[26] nor too tenuous to support antitrust standing.

Certain characteristics of the PC operating-systems market also weigh in favor of finding Novell to be the most direct victim with incentive to serve as a private attorney general. As noted earlier in this opinion, in technologically dynamic markets characterized by network effects, one dominant product typically reigns supreme. *See supra* II.A. Microsoft Windows thus competes more "for the field," parrying threats from outside the field instead of from within. *See id.* Given the apparent absence of a more-directly harmed party than Novell outside the filed and the dominance of Microsoft Windows within the field, we conclude that the *AGC* directness factors weigh in favor of finding antitrust standing here.

Finally, we turn to the fifth *AGC* factor which considers whether a finding of antitrust standing would lead to "problems of identifying damages and apportioning them among those directly and indirectly harmed." *Kloth v. Microsoft*, 444 F.3d 312,

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[26] With a November 2002 consent decree ending the government's suit and triggering, one year later, the ticking of the statute of limitations' clock, any plaintiff's similar claims arising before the end of the government suit would appear to be untimely. *See* 15 U.S.C. § 16(i); *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002).

324 (4th Cir. 2006) (internal quotations omitted). Cases where this factor has been found to bar standing often involve potential plaintiffs *indirectly* injured by the allegedly anticompetitive behavior, raising the specter of complex apportionment of damages among, or duplicative recoveries by, direct and indirect victims of such conduct. *See AGC*, 459 U.S. at 545 (denying standing to the union in part because damages would have to be allocated between directly victimized union subcontractors and their indirectly victimized employees); *Ill. Brick*, 431 U.S. at 737-38 (prohibiting a plaintiff down a distribution change from bringing a private treble-damages action for an overcharge that may have been passed on to it by a middleman). Because we have already determined, on the record before us, that Microsoft's allegedly anticompetitive conduct was *directly* aimed at Novell, there is little risk that any damages Novell might prove would need to be allocated or apportioned among any more-directly injured parties.

We therefore find that the *AGC* factors favor granting standing to Novell to assert Counts I and VI. We thus affirm the district court's denial of Microsoft's motion to dismiss as to these claims on the antitrust-standing issue.

D.

We wish to emphasize here that we address the limited issue of Novell's antitrust standing on these facts. We do not view our decision with respect to Novell as unduly expanding the universe of private antitrust plaintiffs. We recognize, as has the Supreme Court in its consideration of the scope of

antitrust standing, that treble-damages suits under § 4 of the Clayton Act are not to be wielded indiscriminately. We merely hold that Novell, like the owners of the middleware products at issue in *Microsoft II*, is a member of a limited class of plaintiffs for whom the *AGC* factors support antitrust standing, even though they are outside the restrained PC operating-systems market.

III.

A.

Having concluded that Novell does have antitrust standing to assert Counts I and VI, we now turn to Novell's argument that the district court erred in dismissing as untimely Counts II through V, which allege injury to competition in the office-productivity-applications market.

As noted earlier, this action was commenced more than eight years after Novell's claims arose; therefore, all of the claims are time-barred, *see* 15 U.S.C. § 15b (federal antitrust claims barred if brought more than four years after accruing), unless saved by the tolling provision of § 5(i) of the Clayton Act. This section provides in relevant part:

> Whenever any civil or criminal proceeding is instituted by the United States to . . . punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action . . . *based in whole or in part on any matter complained of* in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .

15 U.S.C. § 16(i) (emphasis added).

The tolling statute contemplates an analysis of the relationship between the violations alleged in the government action and those alleged in the private action. *Leh*, 382 U.S. at 59. For the tolling provision to apply, the private plaintiffs must prove, by "comparison of the two complaints on their face[s]," a significant overlap of subject matter between the two actions. *Id.* at 59, 65. There is no requirement, however, of complete identity of the means, objectives, or statutory violations in the public and private lawsuits. *Id.*; *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 323 (1965).

Section 5(i) represents a balance struck by Congress between competing policy objectives. On the one hand, a "grudging interpretation" of § 5(i) "would collide head-on with Congress's . . . belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minn. Mining & Mfg. Co.*, 381 U.S. at 318, 320. On the other hand, § 5(i) reflects a "congressional emphasis on certainty and predictability in the application" of the tolling provision so as to avoid "undue prolongation of [antitrust] proceedings." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 335 (1978) (citing S. Rep. No. 619, 84th Cong., 1st Sess., 6 (1955)).

Beyond these broad principles, the district court here relied upon the general rule that limitations are not tolled when "the government and subsequent private suits . . . arose in distinct markets." 2 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 321a, at 241 (2d ed. 2000). Other courts have also

applied this rule. For example, in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 481 (C.D. Cal. 1991), the markets defined by the government and the private plaintiffs were the same ("refined oil products")—except that they covered different geographical areas— and nearly all of the same producers were active in both areas. *Id.* at 483-84. Nonetheless, the court rejected tolling because the markets were not identical, as they covered different geographical areas. *See id.* at 486; *see also Charley's Tour and Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84, 86 (D. Haw. 1985) (stating, in a case involving the hotel-room-rental market in the government action and the charter-bus-use market in the private action, that § 5(i) does not "mean that a defendant [in a government action] doing business in different markets [has] the statute of limitations tolled as to all of its markets").

B.

Novell argues that the tolling provision preserves Counts II through V because its complaint overlaps significantly with the DOJ complaint. The DOJ complaint, as discussed earlier, was based on allegations of anticompetitive conduct by Microsoft in two product markets: the market for PC operating systems and the market for Internet browsers. J.A. 343 (DOJ Compl. ¶ 53). Novell argues that the "core elements" of its claims "echo allegations made throughout the government's complaint against Microsoft," even though Novell's claims in Counts II through V are for harm to a market distinct from those specifically at issue in the DOJ complaint. Appellee's Br. at 54. Novell cites, inter alia,

paragraph 5 of the DOJ complaint, which alleges, "Microsoft's conduct includes . . . exclusionary agreements precluding companies from distributing, promoting, buying, or using products of Microsoft's software competitors . . .," J.A. 327 (DOJ Compl. ¶ 5); paragraph 13 of the DOJ complaint, which avers that Microsoft's conduct with respect to browsers is an example of Microsoft's activities "with the purpose and effect of maintaining its PC operating-system monopoly and extending that monopoly to *other related markets*," J.A. 330 (DOJ Compl. ¶ 13)(emphasis added); and the government's prayer for relief, which is peppered with references to "other software products," J.A. 375-76. Novell argues that because the DOJ complaint references other software markets, the complaint should be interpreted as "complain[ing] of" harm to office-productivity applications as well as the two markets to which it clearly did allege harm, markets for PC operating systems and for Internet browsers. Appellee's Br. at 53-57.

We cannot accept Novell's proffered interpretation. Though we are mindful of the tolling provision's purpose of providing private plaintiffs the opportunity to wait to assert claims that are the subject of a government action during the pendency of that action, Novell's reading would require us to look beyond the face of the DOJ complaint, in contravention of *Leh*, 382 U.S. at 65. The DOJ complaint only expressly alleges harm to the markets for PC operating systems and for Internet browsers. Novell's allegations of harm to the office-productivity-applications market, therefore, overlap little with the subject matter of the DOJ complaint.

A straightforward application of the different-markets rule also bars application of the tolling provision here. Though Novell characterizes the different-markets rule as merely "a helpful rule of thumb," Appellee's Br. at 63, Novell cites only cases involving either the same markets in the government and private suits, or markets much more closely linked than the PC operating-system market and the office-productivity-applications market. Indeed, the Supreme Court has accepted tolling only where the private plaintiffs make claims in markets identical to, or completely encompassed by, those at issue in the earlier government suit. *See Zenith v. Hazeltine Research, Inc.*, 401 U.S. 321, 323-25, 333-34 (1971) (same markets); *Leh*, 382 U.S. at 64 (market in government suit was that for distribution of refined gasoline in Pacific Coast states, whereas private suit focused on the same market in Southern California only); *Minn. Mining & Mfg. Co.*, 381 U.S. at 315, 322-23 (same markets).[27] Because the office-productivity

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[27] Novell points to several lower-court decisions in which statutes of limitations were tolled when the markets involved in the private suit and the government suit were not identical. *See In re Ariz. Dairy Prods. Litig.*, No. CIV 74-569A (D. Ariz. Nov. 5, 1984) (finding limitations period tolled for filing of claim in *private* action for price-fixing conspiracy in *retail* milk market based on *government* suit for price-fixing in *wholesale* milk market); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 320-31 (S.D.N.Y. 1971) (finding limitations period tolled for claim for damages suffered in a *foreign* broad spectrum antibiotics market for *agricultural* consumption by government suit for conduct in *domestic* broad spectrum antibiotics market for *human* consumption). The markets in both of the above cases were defined rather specifically, however, and a broader market definition could have included both that at issue in the government action and that at issue in the private action (e.g.,

(footnote continued)

market at issue in Counts II through V is neither identical to nor completely encompassed by the PC operating-system market at issue in the government action, these cases are of little service to Novell.

Supporting our conclusion regarding the distinct nature of the markets is the fact that the government's decision to pursue claims involving only the operating-system and Internet browser markets rested on a deliberate choice. The Department of Justice knew that state Attorneys General originally included a claim in their action against Microsoft, filed on the same day as the DOJ complaint in the same court, for harm to a market for office-productivity applications. *See* Compl. at ¶¶ 88-95, 98, 117-19, *New York v. Microsoft Corp.*, No. 98-1233 (D.D.C. Nov. 12, 2002). This claim was subsequently dropped in an amended complaint. *See* First Am. Compl., *id.*[28]

On these facts, we do not believe § 5(i) of the Clayton Act should be construed to permit private plaintiffs to "sit on their rights" and to assert, years after the traditional statute of limitations has run, "claims so much broader than those asserted by the government that they open entirely new vistas of litigation." *Novell, Inc. v. Microsoft Corp.*, Civ. No.

(footnote continued)
the "milk market" or the "broad spectrum antibiotics market"). No reasonably broader market definition could encompass both the operating-system market at issue in the government action against Microsoft and the office-productivity-applications market at issue here.

[28] Section 5(i) applies only to actions brought by the United States, so the Attorneys' General action did not toll the limitations period.

05-1087, 2005 U.S. Dist. LEXIS 11520, at *14 (D. Md. June 10, 2005). To allow Novell to go forward with Counts II through V now would have precisely this undesirable effect, in addition to extending the tolling effect of § 5(i) beyond what the Supreme Court has accepted or condoned in this area. Such an extension of the tolling provision would contravene the goals of certainty and predictability in this area, as well as avoidance of the "undue prolongation of [antitrust] proceedings." *Cf. Greyhound Corp.*, 437 U.S. at 334-35 (quotation omitted).

We therefore hold that the tolling provision of § 5(i) of the Clayton Act does not preserve Counts II through V of Novell's complaint. After tarrying with these claims for more than eight years, Novell cannot now resurrect stale causes of action, and Microsoft is entitled "to the comfort of repose." *Novell*, Civ. No. 05-1087, 2005 U.S. Dist. LEXIS 11520, at *14.

IV.

The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

[Letterhead of the Honorable J. Frederick Motz]

June 10, 2005

In Re: Microsoft Corp. Antitrust Litigation
MDL 1332

Novell, Inc. v. Microsoft Corp.
Civil No. JFM-05-1087

Dear Counsel:

As I mentioned at the close of the hearing held on June 7, 2005, there is a series of motions pending in another proceeding in which I am involved to which I will have to turn my attention in the coming weeks. I expressed to you my concern that as a result, it might take me more time than I would like to rule upon Microsoft's motion to dismiss in this case. After the hearing, however, I concluded that close and difficult though the issues are, I am prepared to decide them now, particularly while your excellent arguments are still flesh in my mind.

It is neither in your interest nor in the public interest to delay resolution of your dispute any longer. Therefore, instead of postponing my rulings until my schedule would permit me to write a more extensive opinion, I have decided to issue my rulings now, setting forth my reasoning in this short

memorandum to you. I hope you understand that the form and nature of the opinion does not mean that I have not considered the questions presented as thoroughly and carefully as I can. As I have previously done in these MDL proceedings, I am simply following my own adage of "writing for the parties, not for the ages."

Microsoft's motion is denied as to Counts I and VI but granted as to Counts 11, III, IV, and V.

Counts I and VI

In Count I Novell alleges that Microsoft unlawfully "obtained and maintained its monopoly power in the Intel-compatible operating systems market by engaging in anticompetitive conduct" and that as a result Novell was damaged, specifically through lost sales of "office productivity applications" (including WordPerfect, a word processing program. and Quattro Pro, a spreadsheet program). Microsoft acknowledges that the claim asserted in Count I is not time-barred because the focus of the government case against Microsoft (during the pendency of which limitations of private rights of action were tolled under 15 U.S.C. § 16(i)) was upon Microsoft's monopoly in the operating system market. Count VI is based upon Microsoft's exclusionary agreements with OEMs. which allegedly were in unreasonable restraint of trade. Although Microsoft does not expressly concede the point, such agreements also were a subject of the government case. Thus, limitations have been tolled as to the claim asserted in Count VI.

In regard to Count I Microsoft makes two contentions, neither of which is meritorious. First. it

argues that Novell no longer owns the claim asserted in that count because it transferred the claim to Caldera in connection with the sale of the DOS operating system, related technology, and claims relating "directly or indirectly" to it. The fallacy in this argument is that the claim asserted in Count I, while arising from Microsoft's monopoly in the operating system market, is for damage not to DOS or any other operating system but for damage to applications software. It is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because DOS competed in the operating system market, such a claim was either a "direct" or "indirect" claim intended to be transferred from Novell to Caldera. Of course, Novell did also have claims against Microsoft for damage caused to DOS and related technology, but these claims (which were settled after Caldera sued Microsoft) are not part of the present action.

Microsoft next argues that Novell lacks antitrust standing as to Count I because the office productivity applications alleged to have been damaged did not compete in the operating system market. According to Microsoft, there is a black-letter rule that only competitors or consumers in a relevant market have standing to sue for harm caused by anti-competitive behavior in that market. Microsoft overstates the proposition. Certainly, competitors and consumers in a given market "are favored plaintiffs," and, just as certainly, "the list of those presumptively disfavored is far longer." *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39,45 (1st Cir. 1995). *See also White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987); *Lucas v. Bechtel Corp.*, 800 F.2d 839,

845-46 (9th Cir. 1986). However, the Supreme Court has not established a litmus test for antitrust standing based upon a plaintiff's status. Rather, in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court - while pointing out that the plaintiff whom it found not to have antitrust standing "was neither a consumer nor a competitor in the market in which trade was restrained," *id.* at 539 – did not simply rely upon that fact but instead articulated a series of factors to be considered in deciding the standing question. *Id.* at 537-45.

In the present case the gravamen of the claim asserted in Count I is that Microsoft specifically targeted Novell for the purpose of maintaining its monopoly in the operating system market. According to Novell, WordPerfect and Quattro Pro, its popular office productivity applications, posed a threat to Microsoft's operating system monopoly because Novell had engineered them to exploit Novell's existing cross-platform technologies, such as OpenDoc and AppWare. Moreover, because these applications were being developed to run independently of any operating system, particularly Windows, and because the consumer demand for them was great, Microsoft saw the need to attack them. In support of this view, Novell, citing an internal Microsoft email, contends that "Microsoft recognized that it had to control the office productivity applications market to fend off that threat to its operating systems monopoly." The Microsoft email stated as follows:

> If we own the key 'franchises' built on top of the operating system, we dramatically widen the

> "moat" that protects the operating system business. . . .We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC. . . .And success in those businesses will help increase the opportunity for future pricing discretion.

E-mail from Jeff Raikes, Microsoft, to Warren Buffet (Aug. 17, 1997).

Novell also alleges that it was a company of particular concern to Microsoft. Paragraph 7 of the Complaint avers:

> Bill Gates, Microsoft's Chairman and Chief Executive Officer, targeted Novell's applications by name in documents recording Microsoft's anticompetitive schemes. in which he explained that the integration of browsing functions into Windows, coupled with Microsoft's refusal to publish certain of these functions, was a primary strategy for excluding Novell's applications from the markets. He candidly admitted that Microsoft's own products could not compete without the benefit of these anticompetitive acts.

Against this background, it is clear to me that Novell meets the various parts of the multi-factored test established by *Associated General Contractors* for antitrust standing. First, there is a direct causal connection between the anticompetitive acts Microsoft allegedly took against Novell's office productivity applications for the purpose of maintaining its operating systems monopoly and the damage claimed in Count I. Second, Microsoft

allegedly targeted Novell specifically because it perceived Novell as an innovator in the industry. This targeting demonstrates that, at the least, Microsoft perceived Novell to be a competitor. *See Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 962-63 (10th Cir. 1990). Third, destruction of a competitor's product for the purpose of maintaining a monopoly self-evidently is the type of harm for which the antitrust laws are intended to provide redress. Fourth, Novell's claim is direct and straightforward. Fifth, although there were other victims of other anticompetitive acts committed by Microsoft for the purpose of maintaining its monopoly in the operating system market, Novell is the only victim who could bring suit for the acts taken by Microsoft in regard to WordPerfect and Quattro Pro – acts which ultimately had an enormous impact upon the shape of the applications software market.[29] Finally, no problem of speculative damages or complex apportionment of damages is presented because Novell is the only person with a claim for the damages it allegedly suffered in

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[29] It would seem that an implication of Microsoft's contention that Novell lacks antitrust standing as to the claim asserted in Count I is that Sun and Netscape also lacked antitrust standing to the extent that they were not direct competitors in the operating system market, i.e., owners of alternative operating systems, but rather developers of middleware products that threatened to render Microsoft's operating system obsolete. Even if that is not so, however, I am satisfied that for the reasons I have stated, Novell may (just as Netscape and Sun did) assert antitrust claims for harm allegedly caused to its non-operating system products as a result of Microsoft's anticompetitive behavior designed to protect its Windows monopoly.

connection with WordPerfect and Quattro Pro between 1994 and 1996 when it sold those products to Corel.

2. Counts II, III, IV, and V

Under 15 U.S.C. § 16(i) the limitations period is tolled for "every private right of action. . . based in whole or in part on any matter complained of" in an antitrust action brought by the United States. For the reasons I have just stated, I find that the claims asserted in Counts I and VI are tolled under this section. As Microsoft contends, however, the mere fact that limitations are tolled as to two counts in a complaint is not sufficient to toll all other counts in the complaint. Section 16(i) refers not to "complaints" but to "right[s] of action," and self-evidently a party cannot be permitted to circumvent the purpose of the statute by simply joining tolled and untolled claims in the same complaint.

The broad principles governing the tolling issue may be briefly stated. The governing test is whether the matters complained of in the private action "bear a real relation" to a matter complained of in the government suit. *Leh v. Gen. Petroleum Corp.*, 382 U.S. 54, 59 (1965). "The private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants," *id.* at 59, but simply must allege "a significant, although incomplete, overlap of subject matter" to toll the statute, "even as to the differences." *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 830 (11th Cir. 1999). "In general, consideration of the applicability of. . . [section 16(i)] must be limited to a comparison of the

two complaints on their face." *Leh*, 382 U.S. at 65; *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 331 (1978).[30] Section 16(i) is not to be given a "niggardly construction" and must be "read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Leh*, 382 U.S. at 59 (quoting *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965)).

In its complaint in this action, Novell refers frequently to allegations and findings made in the government case against Microsoft. These references are incorporated by reference into counts II through V. Those counts, however, assert claims for monopolization and attempted monopolization in the word processing and spreadsheet applications markets: claims that were never asserted by the government. While there was a single conclusory

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[30] As Novell notes, several courts have glimpsed at the record in the government suit in order to evaluate the comparability of the government and private actions. *See, e.g.*, *Morton's Market*, 198 F.3d at 830-32. That approach, however, does not provide any greater support for Novell than does a simple comparison of its complaint and the complaint in the United States' action against Microsoft. The record in the government suit confirms that while an occasional expert may have referred to abuses that occurred in related software markets, those references did not result in any charge of monopolization or attempted monopolization in the office productivity applications market. Indeed, the greatest difference between the complaint in the government action and the ultimate resolution of the case was that whereas the complaint alleged anticompetitive behavior both in the operating system market and in a browser market, the Court of Appeals ultimately found that the evidence did not substantiate the existence of the latter market. *United States v. Microsoft*, 253 F.3d 34, 81-81 (D.C. Cir. 2001).

averment in the government's complaint that Microsoft engaged in anticompetitive activities both to protect its operating system monopoly and "to extend . . . [that] monopoly into other software markets," Gvt. Compl., at ¶ 5, the only markets defined and focused upon in the government complaint were the operating system and browser markets. Word processing and spreadsheet programs are specifically mentioned only once in the government complaint, and only in the section describing the operating system market and only as applications that are "control[led]" and "direct[ed]" by operating systems. *Id.* at ¶ 54.

Novell accepts, as of course it must, that operating systems and office productivity applications are distinct products and are in separate markets. It also accepts as "unremarkable" the bright-line rule stated by Professor Areeda that limitations are not tolled when "the government and subsequent private suits . . . arose in distinct markets." 2 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 321a, at 241 (2d ed. 2000). That proposition is supported by such cases as *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 781 F. Supp. 481 (C.D. Cal. 1991), and *Charley's Tour and Transportation, Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84 (D. Haw. 1985), which held, respectively, that differences between geographic and product markets in the government suits and private actions prevented tolling under Section 16(i). Novell argues, however, that because the operating system and applications markets are closely, indeed symbiotically related, this bright-line rule should not apply. *Cf. In re Arizona Dairy Prods. Litig.*, No. CIV

74-569A (D. Ariz. Nov. 5, 1984) (finding claim for private action for price-fixing conspiracy in retail milk market tolled based on government suit for price-fixing conspiracy in wholesale milk market); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 320-21 (S.D.N.Y. 1971) (finding claim for damage suffered in a foreign market for agricultural consumption tolled by government suit for conduct in domestic market relating to human consumption). I am not persuaded. The nature of the relationship between the markets is important to an understanding of the dynamics of the industry, and it is central to my earlier holding that Novell has antitrust standing for harm allegedly caused to WordPerfect and Quattro Pro by Microsoft's maintenance of its Windows monopoly. However, the government case focused solely upon the operating system market (and an asserted browser market, ultimately found by the Court of Appeals to be unsubstantiated by the evidence), and Novell has provided no adequate explanation for not applying the bright-line rule recited by Professor Areeda in this case.

Undoubtedly, if the government had pursued additional charges of monopolization and attempted monopolization in the word processing and spreadsheet markets, there would have been some overlap in evidence concerning the conduct in which Microsoft engaged. However, the government deliberately chose not to lodge any such charges,[31]

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[31] That such a charge could have been asserted certainly was not unknown. State Attorney Generals originally included a claim for harm for a market for office productivity applications

(footnote continued)

and in my judgment the existence of such a potential overlap does not justify tolling under Section 16(i). While Section 16(i) properly serves the purpose of permitting private plaintiffs to wait to bring private claims encompassed within a government enforcement action until that action has come to an end, it should not be construed to permit private plaintiffs to sit on their rights and assert claims so much broader than those asserted by the government that they open entirely new vistas of litigation. If Novell wanted to assert claims for monopolization and attempted monopolization of the word processing and spreadsheet markets, it should have done so long ago. Its inaction entitles Microsoft to the comfort of repose. *Cf. Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (citing *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 869 (1978) for the proposition that the limitations statute is one of "repose").

(footnote continued)
in the complaint they filed. (*See* Complaint filed in *New York v. Microsoft Corp.* ¶¶ 88-95, 98, 117-19, No. 98-1233 (D.D.C. filed May 18, 1998)). Of course, the filing of this claim did not toll limitations because section 16(i) applies only to actions brought by the United States. In any event, within two months the Attorney Generals abandoned that claim when filing an amended complaint. (*See* First Amended Complaint filed in *New York v. Microsoft Corp.*, No. 98-1233 (D.D.C. filed July 17, 1998)).

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION	* * *	MDL 1332
NOVELL, INC.	* *	
v.	* *	
MICROSOFT CORP.	* * *	Civil No. JFM-05-1087

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MEMORANDUM

Microsoft Corporation has filed a motion requesting that I certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the portions of my order entered on June 10, 2005 denying Microsoft's motion to dismiss Counts I and VI of the complaint filed by Novell, Inc. Novell has opposed the motion.[32] I am satisfied that the June 10th order "involves . . .

[32] During the course of a transcribed telephone conference on August 3, 2005 I asked Novell's counsel if Novell would like me to certify for interlocutory appeal the other rulings I made in my June 10th order (adverse to Novell) in the event that I decided to grant Microsoft's motion for an interlocutory appeal. Novell's counsel responded in the affirmative. However, in a letter dated August 12, 2005, they clarified their response by stating that Novell would seek an interlocutory appeal if, but only if, the Fourth Circuit grants Microsoft's petition for permission to appeal.

controlling question[s] of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Accordingly, Microsoft's motion is granted.

Let me amplify my ruling by saying several things.

First, it is true, as Novell asserts, that in making my rulings as to Counts I and VI, I found Novell's standing to be "clear," that Microsoft's argument based upon the Caldera release to be "a far stretch," and Novell's antitrust injury to be "self-evident." I remain comfortable with my rulings. However, as each day passes, I find that what may seem "clear," "a far stretch," or "self-evident" to me does not always appear the same in the eyes of others. Therefore, particularly in light of the fact that it is strongly in the interest of the public and in the interest of the parties to manage this litigation (which arises from events that occurred many years ago) in an efficient manner, I believe that the Fourth Circuit should be given the opportunity to decide whether my views are so out of focus that they should be promptly corrected.

Second, I take into account, as Microsoft contends I should, the fact that the legislative history of § 1292(b) cites antitrust cases that are brought at the end of (or past) the statute of limitations as examples of instances in which interlocutory appeals might be

appropriate. *See* S. Rep. No. 85-2434 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5256.[33]

Third, as a practical matter, if the Fourth Circuit decides not to grant an interlocutory appeal to review the rulings I made in my June 10th order, that fact alone may assist the parties and their counsel in their positions in this litigation. Even if that is not so, I believe I would be derelict in my duties if I were to put the parties on a course that would require them to incur considerable cost and to expend considerable time and executive resources in litigating this case only to have an appellate court decide at the end of the day that the litigation should have been terminated at the outset.

A separate order is being entered herewith.

Date: August 19, 2005 /s/

J. Frederick Motz
United States District Judge

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[33] Microsoft also alludes to the fact that the Fourth Circuit has indicated that appeals prior to remand to transferor courts are frequently appropriate in MDL cases. See in Re Food Lion, 73 F.3d 528, 532-33 (4th Cir. 1996); see also 17 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 112.06[3] (3d Ed. 2005). Although I fully agree with this proposition, I believe that it is of limited relevance here. Although this action properly has been transferred to me by the Panel on Multidistrict Litigation because it arises from the same nucleus of facts as the others that have been transferred to me in this MDL proceeding, it stands as a separate and independent piece of litigation. Moreover, the issues resolved by my June 10th order are unique to this case.

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted

intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.